



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, PORTLAND DISTRICT
P.O. BOX 2946
PORTLAND, OR 97208-2946

CENWP-ODG

3 May 2024

MEMORANDUM FOR RECORD

SUBJECT: U.S. Army Corps of Engineers (Corps) Approved Jurisdictional Determination in accordance with the "Revised Definition of 'Waters of the United States'"; 88 FR 3004 (18 January 2023) as amended by the "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023),¹ NWP-2011-36-2²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴

On 18 January 2023, the Environmental Protection Agency (EPA) and the Department of the Army ("the agencies") published the "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (18 January 2023) ("2023 Rule"). On 8 September 2023 the agencies published the "Revised Definition of 'Waters of the United States'; Conforming", 88 FR 61964 (8 September 2023) which amended the 2023 Rule to conform to the 2023 Supreme Court decision in *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023) ("*Sackett*").

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR § 331.2. For the purposes of this AJD, we have relied on Section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the 2023 Rule as amended,

¹ While the Revised Definition of "Waters of the United States"; Conforming had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, the territorial seas, or interstate water that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR § 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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as well as other applicable guidance, relevant case law, and longstanding practice in evaluating jurisdiction.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the Review Area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).
 - i. Wetland 2 (Wet 2), 0.02 acre, non-jurisdictional
 - ii. Wetland 3 (Wet 3), 0.006 acre, non-jurisdictional
 - iii. Wetland 4 (Wet 4), 0.005 acre, non-jurisdictional
 - iv. Wetland 5 (Wet 5), 0.86 acre, non-jurisdictional

2. REFERENCES.

- a. "Revised Definition of 'Waters of the United States,'" 88 FR 3004 (18 January 2023) ("2023 Rule")
- b. "Revised Definition of 'Waters of the United States'; Conforming" 88 FR 61964 (8 September 2023)
- c. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area consists of the Air National Guard Facility located north of the Columbia Slough and of the Portland International Airport. The review area is a 223-acre site located in Portland, Multnomah County, Oregon at Latitude/Longitude: 45.578532°, -122.595425° in Sections 7, 8, 38, and 39, Township 1 North, Range 2 East.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), THE TERRITORIAL SEAS, OR INTERSTATE WATER TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The review area is located directly east of the Columbia Slough. The Columbia Slough was determined to be a TNW by the U.S. Army Corps of

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Engineers Portland District in the October 1993 Navigable Riverways Within the State of Oregon List.⁶

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, THE TERRITORIAL SEAS, OR INTERSTATE WATER. The wetlands within the review area have a direct continuous surface connection to the Columbia Slough (TNW). Wetlands 2, 3, and 4 are connect via culverts to Wetland 5. Wetland 5 is connected through culvert to the south of the review area where treated water discharges into the Columbia Slough.

Wetland 2: This aquatic resource is a 0.02 acre palustrine emergent wetland which was constructed for the purposes of attenuating, treating, and conveying runoff water from the adjacent impervious surfaces. Effluent from this aquatic resource flows west through a culvert under hangers and parking areas to Wetland 3.

Wetland 3: This aquatic resource is a 0.006 acre palustrine emergent wetland which was constructed for the purposes of attenuating, treating, and conveying runoff water from the adjacent impervious surfaces and upstream input from Wetland 2. Effluent from this aquatic resource flows south into Wetland 4.

Wetland 4: This aquatic resource is a 0.005 acre palustrine emergent wetland feature which was constructed for the purposes of attenuating, treating, and conveying runoff water from the adjacent impervious surfaces and upstream input from Wetland 2 and 3. Effluent from this aquatic resource flow south into Wetland 5.

Wetland 5: This aquatic resource is a 0.86 acre palustrine emergent wetland future which was constructed for the purposes of attenuating, treating, and conveying runoff water from the adjacent impervious surfaces and upstream input from Wetland 2, 3, and 4. Effluent from this aquatic resource flows south through a culvert to an outfall on the Columbia Slough.

6. SECTION 10 JURISDICTIONAL WATERS⁷: Describe aquatic resources or other features within the Review Area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic

⁶ This MFR should not be used to complete a new stand-alone TNW determination. A stand-alone TNW determination for a water that is not subject to Section 9 or 10 of the Rivers and Harbors Act of 1899 (RHA) is completed independently of a request for an AJD. A stand-alone TNW determination is conducted for a specific segment of river or stream or other type of waterbody, such as a lake, where upstream or downstream limits or lake borders are established.

⁷ 33 CFR § 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as “navigable in law” even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions.

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resource or other feature within the Review Area and how it was determined to be jurisdictional in accordance with Section 10.⁸ N/A

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the Review Area that were found to meet the definition of waters of the United States in accordance with the 2023 Rule as amended at 33 CFR § 328.3(a)(1) through (a)(5), consistent with the Supreme Court’s decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of “waters of the United States” in the 2023 Rule as amended. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

a. Traditional Navigable Waters (TNWs) (a)(1)(i): N/A

b. The Territorial Seas (a)(1)(ii): N/A

c. Interstate Waters (a)(1)(iii): N/A

d. Impoundments (a)(2): N/A

e. Tributaries (a)(3): N/A

f. Adjacent Wetlands (a)(4): N/A

g. Additional Waters (a)(5): N/A

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

a. Describe aquatic resources and other features within the Review Area identified in the 2023 Rule as amended as not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5). Include the type of excluded aquatic resource or feature, the size of the aquatic resource or

⁸ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR § 329.14 to make a determination that a water is a navigable water of the United States subject to Section 10 of the RHA.

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feature within the Review Area and describe how it was determined to meet one of the exclusions listed in 33 CFR 328.3(b).⁹

Wetland 2, 3, 4, and 5: The Corps determined that Wetlands 2, 3, 4, and 5 are not waters of the United States. 33 CFR § 328.3(b)(1) states that waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act are not waters of the United States even where they otherwise meet the terms of 33 CFR § 328.3(a)(2)-(5). These wetlands were initially constructed for and cumulatively function to treat stormwater discharges from the adjacent Air National Guard Facility in accordance with the requirements of the National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) permit (Permit No. 101314). Aerial Imagery indicates that these wetlands were constructed in between 1981 and 1990 when the Air National Guard facility was constructed. These wetlands have remained in their current footprint since then. Wetlands 2, 3, 4, and 5 are currently associated with an existing City of Portland/Port of Portland NPDES MS4 permit. This permit was issued on 15 September 2021, pursuant to Section 402 of the Clean Water Act and is valid until the expiration date of 30 September 2026. The entire Air National Guard facility and the subject aquatic resources are listed as a part of the Port of Portland NPDES MS4 Permit Area Figure in 2023 Annual Report. Thus, Wetlands 2, 3, 4, and 5 are part of a waste treatment system designed to meet the requirements of the Clean Water Act. Therefore, these wetlands are not waters of the United States and are excluded from jurisdiction under Section 404 of the Clean Water Act.

- b. Describe aquatic resources and features within the Review Area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the 2023 Rule as amended (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). N/A

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.

- a. Desktop Review conducted 10 April 2024.
- b. Oregon Department of Environmental Quality NPDES Permit No. 101314 issued 15 September 2021 and Annual Report dated 1 November 2023.

⁹ 88 FR 3004 (18 January 2023)

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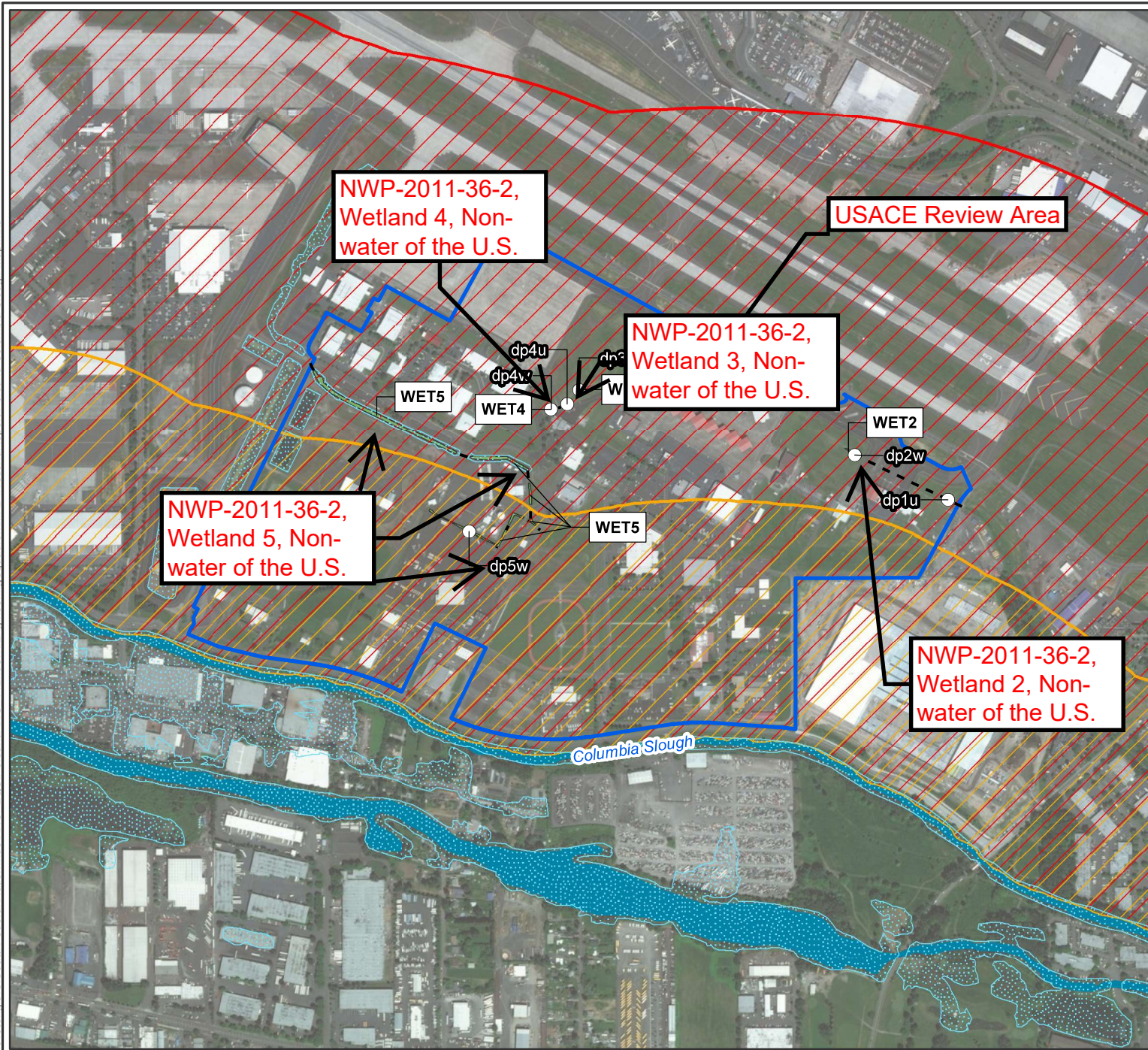
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- c. “Navigable Riverways within the State of Oregon, Portland District – Corps of Engineers” dated October 1993
- d. U.S. Department of Agriculture Natural Resources Conservation Service Web Soil Survey Tool accessed 10 April 2024.
- e. Aerial Imagery: Oregon State Imagery Program (accessed via Corps Portland District National Regulatory Viewer) and Google Earth on 10 April 2024.
- f. U.S. Fish and Wildlife Service National Wetland Inventory Map Tool accessed via Corps Portland District National Regulatory Viewer on 10 April 2024.

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR’s structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

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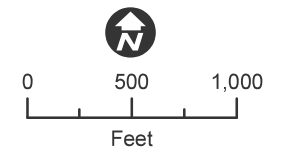


Legend

- Installation Boundary
- Columbia Slough
- Columbia Slough 1,500 ft Buffer
- Columbia Slough 4,000 ft Buffer
- 100 yr Floodplain
- PEM
- Culvert
- Data Point

References:

Aerial: ESRI, 2016
Projection: WGS 1984 UTM 10N Meter



August, 2018

Portland National Guard
FY16 Natural Resource INRMP
Support

Columbia Slough Map